Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Communication Provisions of the	)	CG Docket No. 10-213
Twenty-First Century Communications and	)	
Video Accessibility Act of 2010	)	

COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

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CTIA-The Wireless Association® ("CTIA")[1/] hereby submits these comments in response to the Commission's *Public Notice* regarding the advanced communications provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (the "Act"), to help provide a record to "assist in the development of the Notice of Proposed Rulemaking" ("NPRM") required by the Act.[2/] The wireless industry welcomes the opportunity to provide persons with disabilities with access to the innovative and competitive wireless ecosystem. CTIA respectfully submits that the Commission can best implement the Act by providing the clarity, certainty, and flexibility to meet the requirements of the Act that will ensure persons with disabilities have meaningful access to innovative advanced communication services. In particular:

- The Commission in the NPRM should clearly and unambiguously identify the services it believes are covered by the Act's requirements;

1/ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

2/ *Advanced Communication Provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010,* CG Docket No. 10-213, Public Notice, DA 10-2029 (rel. Oct. 21, 2010) ("*Public Notice*").

- The Commission in the NPRM should propose the respective responsibilities of all participants in the communications ecosystem for the accessibility of covered products and services; and
- The Commission should seek, in each of its proposals for requirements and procedures, to give covered entities maximum flexibility in determining how to offer accessibility and comply with accessibility obligations.

In so doing, the Commission can implement the Act so as to best ensure continued innovation and technological progress in making modern communications accessible.

INTRODUCTION AND SUMMARY

In light of the significant benefits wireless devices and services offer persons with disabilities, CTIA supported and worked tirelessly for the passage of the Act and welcomes the opportunity to offer input to the Commission's implementation of the Act. CTIA recognizes that accessible wireless devices and services are vital to the ability of persons with disabilities to participate in today's modern communications society. As a result of the robust and competitive wireless ecosystem, U.S. consumers today, including those with disabilities, have the kind of choice and value that consumers around the world strive for.[3/]

CTIA and the wireless industry have continuously demonstrated that innovation and competition throughout the wireless ecosystem benefits the accessibility community, as carriers compete to offer service plans and accessible software specifically for persons with disabilities.[4/]

[3/] For example, the Commission's Hearing Aid Compatibility ("HAC") reports note that, as of June 30, 2010, over 300 handsets with an M3 or M4 rating, and over 230 with a T3 or T4 rating, were offered during 2009-2010 – up from over 200 M3/M4-rated and over 150 T3/T4-rated handsets during the prior year; in November 2006 manufacturers offered 113 models with an M3/M4 rating, while 57 models met a T3/T4 rating. *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Report on the Status of Implementation of the Commission's Hearing Aid Compatibility Requirements, 22 FCC Rcd 17703, ¶ 21 (WTB 2007). *See also* Comments of CTIA – The Wireless Association®, WT Docket No. 10-133 (filed July 30, 2010) (reporting that at least 33 companies manufacture more than 630 unique devices for the U.S. market).

[4/] *See* AT&T, Text Accessibility Plans (TAP), http://www.wireless.att.com/learn/articles-resources/disability-resources/disability-resources.jsp (last visited November 21, 2010); Sprint Relay Data Only Plan, http://sprintrelaystore.com (last visited November 21, 2010); T-Mobile Smartphone ® Plans www.sidekick.com (last visited November 21, 2010); U.S. Cellular, Deaf and Hard of

Moreover, competition is vigorous among manufacturers to increase market share and serve persons with disabilities by incorporating "built-in" accessibility features, including text-to-speech and screen readers, HAC, support for Tele-Typewriters ("TTY") and Assistive Technology ("AT"), predictive text, word completion, voice-activated features and closed-captioning.[5/] Persons with disabilities can now find innovative, lower-cost mobile devices and services to replace expensive, immobile assistive communication devices. Through the competitive wireless ecosystem, the wireless industry is clearly moving in the right direction to provide increased accessibility for these communities. Therefore, the Commission's implementation of the Act should facilitate the wireless industry's collective commitment to key accessibility issues as consumers and industry move to an Internet Protocol ("IP")-based communications world.

Implementation of the Act will occur most rapidly and smoothly if all participants in the communications ecosystem and persons with disabilities share a common understanding of the scope of covered services and the respective responsibilities for the accessibility of those products and services. In addition, the Commission's rules will ensure continued innovation and technological progress if covered entities are given maximum flexibility in determining how to offer accessible products and services. Notably, the Act's legislative history recommends that

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Hearing/Text-Only Calling Plans, http://www.uscellular.com/uscellular/common/common.jsp?path=/plans/text-only.html (last visited November 21, 2010); Verizon Wireless, Nationwide Messaging Plans, http://aboutus.vzw.com/accessibility/index.html (last visited November 21, 2010).

5/ *See* Apple, Inc., www.apple.com/accessibility/ (last visited November 21, 2010); Motorola, Inc., www.motorola.com/accessibility (last visited November 21, 2010), Nokia, Inc. http://www.nokiaaccessibility.com/ (last visited November 21, 2010); RIM, Inc., BlackBerry Accessibility http://na.blackberry.com/eng/support/devices/blackberry_accessibility/ (last visited November 21, 2010); National Center for Accessible Media ("NCAM"), Captioning Solutions for Handheld Media and Mobile Devices - Device Comparison Chart http://ncam.wgbh.org/invent_build/web_multimedia/mobile-devices/devices (last visited November 21, 2010).

the Commission adopt the new requirements in a manner similar to implementation of Section 255 of the Communications Act and specifically recognizes the success of the Commission's HAC rules that rely on the adoption of industry-standards developed through collaboration with consumer stakeholders.[6/] The best means of ensuring that the new rules promote the Act's goals of continuing to increase the accessibility of modern communications is for the Commission to create rules that provide clarity, promote innovation, and preserve flexibility.

I. THE COMMISSION'S RULES SHOULD CLEARLY IDENTIFY THE SCOPE OF COVERED ADVANCED COMMUNICATIONS SERVICES

A. The Commission's Rules Must Comport With Congress's Direction And Intent To Clearly Identify "Advanced Communications Services" Offered To The Public That Are Essential To Interactive Communications.

Under the Act, the term "advanced communications services" means interconnected VoIP service; non-interconnected VoIP service; electronic messaging service; and interoperable video conferencing service. As the *Public Notice* observes, the statutory definitions of the latter three services are new.[7/] The Commission therefore asks for input on how to apply these new definitions to the requirements of the Act. Any further interpretation of these terms by the Commission must meet three standards.

First, any explication of the Act's definitions made by the Commission should clearly and unambiguously identify the services that must be made accessible. Although the Act lists services covered by the definition of "advanced communications," it also highlights, as discussed below, certain limitations on or exclusions from those services that it may be appropriate for the Commission to incorporate into its rules. All interested parties need to clearly understand what services are covered by the definitions, so that covered entities can ensure that they are in

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6/ H.R. Rep. No. 111-563, at 24 - 26 (2010) ("House Report").

7/ *Public Notice*, Section II, ¶ 1; *see also* Pub. L. No. 111-260, § 101(1) (amending Section 3 of the Communications Act).

compliance with the Act, and to avoid disputes over whether other services are subject to the Act. By establishing a common understanding of what services are covered, the Commission can ensure that all parties can devote appropriate resources to meeting their respective obligations under the Act to make these services accessible.

Second, the Commission should make clear that the term "advanced communications services" covers only services offered to the public. Interpreting the term in this manner would ensure greater clarity for interested parties and consistency with Section 716, which provides that the Act's accessibility requirements "shall not apply to any customized services . . . not offered directly to the public."[8/] Moreover, it would comport with Congress's intent and direction that Section 716's reach extends to services offered to "consumers."[9/] It would also ensure parity with the scope of Section 255.[10/]

Third, the services included within "advanced communications services" should be interpreted to include only those services that are essential to two-way, interactive communications and are actually being offered to the public as "advanced communications services." Services that fall incidentally within one of the definitions but are not primarily intended to be used for "advanced communications services" – such as electronic messaging services offered as an incidental service within IP-based applications – are not essential to advanced communications and should not be subject to the requirements of the Act. Indeed, Congress plainly intended that the Commission identify and exclude such services, when it directed that the Commission consider waiving the requirements of Section 716 for any service

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8/ 47 U.S.C. § 617(i).

9/ *Id.* § 617(b)(2)(B).

10/ Section 255 applies to telecommunications services, which are defined as the offering of telecommunications "directly to the public." 47 U.S.C. § 153(46).

or class of services that "is designed for multiple purposes, but is designed primarily for purposes other than using advanced communications."[11/] The Commission should seek comment on what qualifies as such an "essential" service "primarily" used for advanced communications through the prospective guidelines it is required to issue under Section 716(e)(2) of the Act.

With regard to the definition of "electronic messaging service," in addition to the characteristics of all advanced communications services discussed above, the Commission should make clear that the definition added by the Act – and the regulatory consequences that flow from it – will be limited to the context of Section 716. In particular, as CTIA has consistently noted, text-based communications are properly classified as "information services" under the Communications Act, and such services are not subject to the Commission's jurisdiction over "telecommunication services."[12/] The Commission should not interpret its Section 716 jurisdiction over "electronic messaging services" as granting broader regulatory authority over non-telecommunications text-based communications services.

B. As Congress Intended, The Commission Must Ensure That Services and Equipment Covered Under Section 255 Are Not Superseded By Section 716's Requirements.

Section 716(f) of the Act provides that the requirements of Section 716 "shall not apply to any equipment or services, including interconnected VoIP service, which are subject to the

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11/ 47 U.S.C. § 617(h)(1)(B).

12/ *See, e.g.*, Reply Comments of CTIA - The Wireless Association, *Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding*, GN Docket No. 09-191, WC Docket 07-52 (filed Nov. 4, 2010) at 23; Reply Comments of CTIA - The Wireless Association, *Petition of Public Knowledge et al. for Declaratory Ruling Stating that Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules*, WT Docket No. 08-7 (filed Apr. 14, 2008) at 11-12; Comments of CTIA - The Wireless Association, *Petition of Public Knowledge et al. for Declaratory Ruling Stating that Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules*, WT Docket No. 08-7 (filed Mar. 14, 2008) at 48-49.

requirements of section 255 on the day before enactment."[13/] The FCC's implied suggestion[14/] to limit what is grandfathered under Section 255 by excluding equipment that is used to provide both telecommunications and advanced communications service is plainly inconsistent with the language and intent of Section 716(f). Section 716(f) explicitly states that services or equipment covered by both Section 255 and 716 "shall remain subject to the requirements of section 255."[15/] Therefore, services and equipment covered by Section 255 should remain subject to Section 255, regardless of their coverage by Section 716.

II. THE COMMISSION SHOULD APPLY SECTION 716'S "ACHIEVEABLE" STANDARD TO THE SPECIFIC EQUIPMENT OR SERVICE IN A WAY THAT ENSURES INDUSTRY HAS THE FLEXIBILITY AND CERTAINTY TO COMPLY WITH THE ACT

A. The Commission's Interpretation And Application Of Section 716's "Achievable" Standard Should Not Cause A Fundamental Alteration To A Product Or Service Or Require The Incorporation Of Proprietary Technology.

Section 716's "achievable" standard is based on a determination of "reasonableness" ascertained by the Commission through consideration of: (1) the nature and cost of the steps needed to meet the requirements of Section 716 with respect to the specific equipment or service in question, (2) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies, (3) the type of operations of the manufacturer or provider, and (4) the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality.[16/]

13/ 47 U.S.C. § 617(f).

14/ *Public Notice*, Section III, ¶ 1.

15/ 47 U.S.C. § 617(f).

16/ 47 U.S.C. § 617(g).

The legislative history of this section notes that it is intended to "ensure[] that the Commission will focus its analysis on the specific product or service in question" and also observes that the "existence of substantial financial resources does not, by itself, trigger a finding of achievability."[17/]

Recognizing that the "achievable" standard differs slightly from the "readily achievable" standard of Section 255, it bears mentioning that the latter has allowed the wireless industry to quickly introduce innovative wireless devices while responding to consumer demand for accessibility. The Commission should thus interpret "reasonable" in the context of the Act's new standard as more than that which is "easy" but less than steps which would cause a "fundamental alteration" or require the incorporation of proprietary technology. Indeed, in setting the "achievable" standard on a basis of "reasonableness," Congress clearly stated that the inclusion of accessibility features in a product or service that results in a "fundamental alteration" of that service or product "is *per se* not achievable."[18/] Congress also explained that the mere "existence" of accessibility solutions in the market do not determine whether a solution is "reasonable" for that particular product or service.[19/] The guidance the Commission issues on the "achievable" standard, therefore, should reflect both the industry's heightened obligations under this standard as compared to the "readily achievable" standard and the Congressionally-recognized limitations on what is meant by "achievable," so as to cabin the standard in ways that are consistent with these limitations.

17/ House Report at 25.

18/ House Report at 24-25.

19/ House Report at 24.

B. Even Under The "Achievable" Standard, Providers And Manufacturers Retain Some Flexibility So That Not Every Feature Or Function On Every Device Must Be Accessible For Every Disability.

In considering whether or not a product or service must be made accessible, covered entities will also need to make determinations under Section 716(j) of whether such accessibility is appropriate for the product or service at issue. Section 716(j) establishes an affirmative limitation on what is expected of manufacturers and providers that is separate and apart from the consideration of whether accessibility is "achievable." Even where accessibility may otherwise be achievable, Congress made clear that the Act's accessibility requirements do not require manufacturers and service providers to make every product or service they offer accessible. This is part of the Act's overall emphasis on preserving industry flexibility and giving manufacturers and service providers the maximum possible choice regarding how accessibility will be incorporated into a device or service. Through Section 716(j), Congress preserved covered entities' ability to implement the stated requirements in ways that fit individual companies' business models while fully meeting the needs of persons with disabilities.

In considering how to give independent meaning to Section 716(j), the Commission should therefore look broadly at whether a manufacturer or provider has a variety of accessibility features available on a range of products or services, rather than whether every single product or service in a product line is accessible. This approach will ensure that persons with disabilities have access to a broad range of choices at different price points, while allowing providers or manufacturers to offer accessible products and services to meet a range of needs for persons with disabilities.

C. The Commission Should Ensure Industry Has Certainty By Providing Performance Objectives, Guidelines And Safe Harbors That Are Clear, Promote Maximum Flexibility, And Avoid Favoring Any Particular Technological Approach To Accessibility.

To guide implementation of the accessibility requirements of the Act, the Commission is directed to develop performance objectives and prospective guidelines.[20/] It may also adopt technical standards as a safe harbor for manufacturers' and service providers' compliance with these requirements "if necessary to facilitate" compliance.[21/] To be useful, these performance objectives, prospective guidelines, and any safe harbors must be clear and understandable. Indeed, Congress noted that the prospective guidelines for accessibility are meant to "provide[] industry with greater clarity in meeting those accessibility requirements" and "make[] it easier for industry to gauge what is necessary to fulfill the requirements of this measure," and that therefore the Commission should "offer guidance that provides industry as much certainty as possible regarding how the Commission will determine compliance with any new obligations."[22/]

The performance objectives, prospective guidelines and any safe harbors adopted by the Commission also should allow for the maximum flexibility for service providers and manufacturers. Consistent with Congress's intent to preserve providers' and manufacturers' ability to make independent business decisions wherever possible, covered entities should be free to utilize whatever approaches and technologies they select, as long as it results in the provider or manufacturer meeting its obligations to make its products and services accessible. Affording them this flexibility will enable them to continue to facilitate the enormous advances that American consumers have witnessed in the accessibility of communications equipment and services over the last decade. Moreover, it is critically important that providers and

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20/ 47 U.S.C. §§ 617(e)(1)(A), (e)(2).

21/ 47 U.S.C. § 617(e)(1)(D).

22/ House Report at 25.

manufacturers have the flexibility to meet their requirements in different ways, based on their subscriber's demographics, resources, and other relevant factors, rather than a one-size-fits-all approach that does not take into account the nuances inherent to each communications industry subfield.

It is particularly important that the Commission avoid establishing standards or safe harbors that, while explicitly refraining from mandating technical standards as required by the Act,[23/] have that effect in practice. Accessibility is best promoted by allowing the fullest possible experimentation and innovation and by allowing a variety of marketplace solutions to emerge. Moreover, any technical requirements established by rule today will soon be outdated. Avoiding favoring any particular technological approach will ensure that whatever objectives or guidelines are put forth remain relevant to both the communications technologies consumers use today and those that will be more prevalent going forward.

The *Public Notice* also seeks comment on the usefulness of the draft standards and guidelines under Section 508 of the Rehabilitation Act, released for comment by the United States Access Board ("Board") in March 2010.[24/] CTIA generally believes that Section 508 and its implementing standards have provided important and useful incentives for information and communication technology vendors to improve the accessibility of their products. As CTIA observed in its comments on the draft standards,[25/] however, many of the draft standards were

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[23/] 47 U.S.C. § 617(e)(1)(D).

[24/] *Public Notice*, Section 2, ¶¶ 6 & 8. *See also* United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines* (March 2010), *available at* http:/www.access-board.gov/sec508/refresh/draft-rule.pdf.

[25/] *Americans With Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Telecommunications Act Accessibility Guidelines; Electronic and information Technology Accessibility Standards*, Docket No. 2010-1, Joint Comments of the Telecommunications Industry Association and CTIA- The Wireless Association to the Architectural and Transportation Barriers and Compliance Board (filed June 21, 2010).

insufficiently clear to provide useful guidance, did not offer manufacturers certainty as to which requirements apply for which regulatory purpose, did not offer manufacturers and providers sufficient technological flexibility to enable a seamless transition from traditional devices to IP-based technologies, and in some cases, sought to impose backward-compatibility obligations that deter innovation.[26/] As such, CTIA believes the Access Board's standards and guidelines as proposed would have limited value for these purposes. Instead, adopting a flexible approach will promote consumer choice in accessibility features by promoting innovation and avoid locking the industry into legacy technologies, facilitating a healthy accessibility devices marketplace specifically and a vibrant, diverse wireless ecosystem generally.

III. THE COMMISSION SHOULD IMPLEMENT RULES THAT REFLECT THE DYNAMIC AND INNOVATIVE NATURE OF THE WIRELESS ECOSYSTEM

A. Establishing Clear Third Party Limited Liability Provisions Is A Critical Step In Implementing The Act.

The Commission in the *Public Notice* mentions the Act's third party limited liability provisions only in passing,[27/] but establishing the liability protection for covered entities within the wireless ecosystem is a fundamental element of implementing the Act. Unlike the circuit-switched world where service providers and manufacturers controlled the equipment and services offered to the end user, the IP-based world is a dynamic ecosystem where multiple providers, manufacturers and entities offer products or services directly to the end user. As wireless networks have evolved to support robust broadband experiences, as devices have

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[26/] For example, Chapter 9 of the Access Board's draft standards appears to impede the transition from traditional TTY devices to IP-based technologies. At the same time, Section 105(c) of the Act directs the Commission's Emergency Access Advisory Committee to develop recommendations regarding the potential replacement of TTY technology with more effective next-generation technology. It is important that the Commission's implementation of the Act avoid prejudging the appropriate and available standards in a manner that could compel or lock in the use of a particular technology.

[27/] *Public Notice*, Section III, ¶ 4.

evolved to feature increased functionality in Internet access, and as smart phones continue to proliferate, an explosion of applications and content designed to run on or be viewed over these networks and devices is occurring, often to the benefit of persons with disabilities.[28/] In today's market-driven "open access" environment, manufacturers and service providers are not able to anticipate or review all of the software and applications an end user may add to a handset. Wireless service and equipment providers do not control – and often, are not even aware of – the content wireless subscribers access over their devices, the applications they run, or the services they access over the network.

Recognizing the significant potential of this "open" ecosystem, Congress has provided greater certainty regarding which covered entities are liable for compliance with the Act. Congress made clear that network operators and equipment manufacturers are not responsible for ensuring that third party video programming, online content, applications, services or equipment used to provide advanced communications services are in compliance with the Act's requirements when the operator or manufacturer's involvement is limited to providing transmission, routing, storage, or providing an information location tool, and are protected from

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28/ *See, e.g.*, Comments of CTIA – The Wireless Association, *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (filed July 9, 2010) at 12-13 (discussing CTIA member companies' steps taken to encourage and facilitate mLearning, which will directly benefit persons with limited mobility or communication abilities). Similarly, in a recent FCC White Paper, the Commission described how manufacturers are incorporating features into their requirements which are encouraging more and more third party applications to utilize built-in accessibility features, often yielding more efficient and affordable solutions to disabled users even than dedicated Assistive Technologies ("AT") devices. *See* Elizabeth E. Lyle, FCC, *A Giant Leap & A Big Deal: Delivering on the Promise of Equal Access to Broadband for People with Disabilities*, at 13 (April 2010), *available at* http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-working-report-giant-leap-big-deal-delivering-promise-of-equal-access-to-broadband-for-people-with-disabilities.pdf.

liability when acting in this capacity.[29/] The Commission must take great care in its rules not to diminish the value of this protection.

Today, manufacturers and service providers frequently facilitate their customer's ability to identify and use these third party applications and services, for example, in an applications "store" on the provider's website or through informational outreach to their customers, such as advertising that a specific wireless device offers access to the New York Times or Wall Street Journal. These features and information resources allow consumers to easily locate, download and use applications and services that may be of interest to them. If the Commission's rules clearly address the scope of the Act's liability protection, providers and manufacturers will have the certainty to ensure that persons with disabilities, and consumers generally, are aware of these innovative products or services.

B. The Commission Must Clearly Delineate The Responsibility Of Each Participant In The Ecosystem.

The Act requires the Commission to determine the respective obligations under Section 716 of manufacturers, service providers, and providers of applications or services accessed over service provider networks. Establishing easily comprehensible rules that clearly delineate the extent of each participant's responsibilities to make their products or services accessible, particularly combined with the strong liability protections discussed above, will allow each participant to appropriately plan and develop their products and services accordingly, minimizing later disputes. Such a stable and predictable regulatory environment inspires greater investment and innovation and assures that products and services will be accessible as intended.[30/]

[29/] Act § 2. The only exception to this limitation on liability is if the provider or manufacturer is relying on those applications, services, software, hardware or equipment to comply with its own obligations under the Act.

[30/] *See, e.g., Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets; Petition of American National Standards Institute Accredited Standards Committee C63*

As part of ensuring that all participants in the ecosystem have the guidance and information they need to implement the Act's accessibility provisions, the Commission should identify industry-developed accessibility standards for third party applications or services. The Act provides that network providers may not install network features, functions or capabilities that impede accessibility, and similarly requires the Commission to prescribe rules providing that advanced communications services, equipment and networks may not impede the accessibility of information content accessed over the service, equipment or network if that accessibility has been incorporated for transmission.[31/] A network provider cannot be expected to comply with these requirements, however, unless it knows which standards have been used to incorporate accessibility into content and applications.

The only reasonable means of ensuring compliance is for the Commission to identify industry-recognized accessibility standards for applications and content and require their use, so that the scope of a network operator's obligation not to block accessibility is clearly defined. The Commission has successfully implemented such an approach in its HAC rules that rely on industry-standards developed through collaboration with consumer stakeholders.[32/] Until such time as similar standards are identified for these purposes, the Commission should refrain from enforcing these obligations on network providers.

(EMC) ANSI ASC C63R, First Report and Order, 23 FCC Rcd 3406, ¶ 24 (2008) (noting the "need for certainty, and the desirability of providing appropriate and timely notification to manufacturers and service providers as regards their [accessibility] obligations.").

31/ 47 U.S.C. §§ 617(d), (e)(1)(B).

32/ *See* 47 C.F.R. § 20.19(b); *see also Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets; Petition of American National Standards Institute Accredited Standards Committee C63 (EMC) ANSI ASC C63R*, First Report and Order, 23 FCC Rcd 3406, ¶ 77 (2008) (noting Commission's finding that codification of standards leads to a greater number of products available to the disabled)*;* House Report at 24 – 26.

Moreover, the Commission also should ensure that any rules seeking to limit the incorporation of any network features or functions recognize the need for covered entities to manage all network traffic, including advanced communications services.[33/] Wireless broadband networks deliver consistently reliable performance only because of their network management techniques. Impeding providers' ability to utilize these techniques in the name of promoting accessibility would interfere with providers' ability to ensure that all their subscribers, including persons with disabilities, receive the high level quality of service they expect.

C. The Commission Must Define "Reliance On" Third Party Solutions To Provide Industry With Sufficient Clarity And Certainty To Comply With The Act.

As part of its effort to delineate responsibility among the different participants in the ecosystem and establish clear limitations on liability, the Commission must clarify what is meant by "rely[ing] on" third party applications, services, software, hardware or equipment to comply with the requirements of the Act.[34/] The Act provides that if a provider or manufacturer engages in such reliance, then it is not protected against liability for ensuring that such applications, services, software, hardware or equipment comply with the Act.[35/] However, there are many instances in which a provider or manufacturer might identify a third party solution – such as easing the ability to find relevant applications or services through categorization, lists or other means – without necessarily "relying on" such a solution for its compliance with the Act's requirements. The Commission should provide clarity as to when a covered entity has "relied

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33/ *See generally* Comments of CTIA – The Wireless Association, *Preserving the Open Internet*, GN Docket No. 09-191 (filed Jan. 14, 2010); Reply Comments of CTIA – The Wireless Association, *Preserving the Open Internet*, GN Docket No. 09-191 (filed Apr. 26, 2010).

34/ Section 718 includes similar language permitting a manufacturer or provider to "rely on" third party applications, devices, software, hardware or CPE to meet the accessibility requirements for Internet browsers in mobile telephones.

35/ Act § 2(b).

upon" a third party solution for compliance, so that, as discussed above, the limitations on liability are clear and predictable and to assist in promoting a competitive, innovative and consumer-friendly ecosystem.

IV. ENFORCEMENT PROCEDURES AND RECORDKEEPING OBLIGATIONS SHOULD BE LIMITED TO WHAT IS REQUIRED BY THE ACT

A. The Commission's Enforcement Procedures Should Be Clear, Reasonable, And Favor The Informal Resolution Of Complaints.

In implementing the complaint processes required by the Act, the Commission should create an environment that facilitates greater communication among parties and informal resolution of concerns wherever possible. Such an environment includes requiring parties believing that a manufacturer or provider has violated a rule to notify the manufacturer or provider before filing a complaint, allowing the provider or manufacturer an opportunity to respond directly to the potential filer, requiring that complaints be filed in a timely manner following the alleged violation and response from the provider or manufacturer, and requiring the filing of informal complaints before instituting the complicated formal complaint process. The Commission should further require, as it does for complaints involving violations of other Commission rules, that persons alleging violations provide some evidence of the violation and demonstrate that they have been harmed by the violation.[36/] Such procedures will ensure that the Commission's time and resources are devoted only to complaints that have a sufficient evidentiary basis and need for Commission involvement.

B. The Commission's Recordkeeping Requirements Should Be Limited To Essential And Relevant Information.

All recordkeeping requirements are very costly, occupying time, resources and space. As

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[36/] *See, e.g.*, 47 C.F.R. § 79.1(g) (complaint and enforcement procedures for alleged captioning violations); 47 C.F.R. §68.414 *et seq*. (complaint and enforcement procedures for alleged HAC violations).

such, the Commission should require covered entities to maintain only those records which are absolutely required by Section 717(a)(5). Those include: (1) information about efforts to consult with individuals with disabilities; (2) descriptions of the accessibility features of its products and services; and (3) information about compatibility of those products and services with specialized customer premises equipment commonly used in the market to achieve access.[37/] Providers and manufacturers should be allowed to keep all such records electronically, and should not be required to keep them in any format other than the manner in which they are kept in the ordinary course of business.

Moreover, these recordkeeping requirements should be used by the Commission only to inform itself about the extent of accessible products and services so that it may gauge industry progress in meeting the Act's intended goals. As required by the Act, records should be kept confidential.[38 /] Although the Commission may request them for its own use in resolving a complaint, the records should not be discoverable by private individuals seeking to enhance a complaint against a manufacturer or provider. Further, any recordkeeping requirements should not be used as a vehicle for imposing additional accessibility requirements – *e.g.*, keeping records of any contacts with individuals with disabilities should not be seen as an invitation to impose requirements to initiate such contacts, and the requirement to keep information about compatibility should not be viewed as a requirement to achieve any level of compatibility.

V. SECTION 718'S REQUIREMENTS FOR MOBILE BROWSERS MUST BE READ IN HARMONY WITH THE REQUIREMENTS OF SECTION 716

Recognizing the significant potential of mobile broadband services, Congress ensured that persons who are blind or visually impaired can access the "functionality" of mobile Internet

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37/ 47 U.S.C. § 618(a)(5).

38 / 47 U.S.C. § 618(a)(5)(C).

browsers. The Act requires that Internet browsers included in mobile phones be accessible to individuals who are blind or visually impaired, unless not "achievable."[39/] The Commission asks how this requirement "affect[s] how to interpret and implement any of the requirements in Section 716."[40/]

The requirements of Sections 716 and 718 must be viewed together. Where Section 718 requires that a device's Internet browser be made accessible in addition to the accessibility required under Section 716, any evaluation of what is "achievable" must take into account the accessibility required under both sections. Conducting two separate "achievability" analyses, under which the cost of the accessibility and other factors are evaluated separately rather than as a whole, would defeat Congress's intent to ensure that the accessibility requirements promote continued innovation and investment into the marketplace.

Moreover, in interpreting Section 718's requirements, the Commission should keep in mind that several important limitations of Section 716 apply here as well. First, Congress made clear that these requirements apply only to Internet browsers incorporated by the original manufacturer or service provider, and not to Internet browsers added by the end user after purchase. As discussed above, end users frequently add a wide variety of applications or add-ons to their devices, for which the Act clearly provides that providers and manufacturers are not responsible. Second, the Commission should recognize that the "functions" of browsers that should be made accessible are those features that provide the "on-ramp" to Internet access, not the Internet content itself. In order to ensure continued Internet-based innovations, Congress has placed the responsibility to provide accessible Internet content with the provider of such content and not the mobile Internet browser provider. Finally, as discussed above, any access to mobile

39/ 47 U.S.C. § 619(a).

40/ *Public Notice*, Section V.

Internet browsers solutions must be achievable without "fundamentally altering" the intended use of the browser, and the mere "existence" of accessibility solutions in the market does not determine whether a solution is "reasonable" for that particular product or service.

CONCLUSION

For the above reasons, CTIA believes that the Commission should strive in the forthcoming NPRM on accessibility to promote and preserve the greatest possible clarity, certainty, and flexibility, while ensuring that the forthcoming rules meet the goals of the Act to increase the access of persons with disabilities to modern communications.

Respectfully Submitted,

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